United States Circuit Court Of Appeals

FOR THE NINTH CIRCUIT

BRUCE RICHARDS and AUGUST OESS, **Plaintiffs in Error,** vs THE UNITED STATES OF AMERICA, **Defendant in Error.**	**No. 3381**

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE

In the case at bar, W. F. Toles, J. P. Symons, Bruce Richards, August Oess, Joe Lucas and J. H. Boomer were indicted and charged with conspiring among themselves to ship and caused to be shipped from the State of California into the State of Washington, certain packages of spirituous intoxicating liquor, whiskey, without such

package being so labeled on the outside covers thereof, as to plainly show the name of the consignee thereof, the nature of the contents thereof or the quantity contained therein.

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The Government dismissed the indictment against the defendants Joe Lucas and J. H. Boomer.

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The defendants, W. F. Toles, J. P. Symons, Bruce Richards and August Oess, each entered a plea of not guilty to this indictment.

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These four defendants were tried on said indictment before a jury and the jury rendered a verdict finding defendants Toles and Symons not guilty, and the defendants Bruce Richards and August Oess guilty. The two last named defendants filed a motion for a new trial, and the court denied the same; and sentenced each of the defendants Bruce Richards and August Oess to pay a fine of $500.00 and to serve sixty days in Lewis County jail.

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From this judgment and sentence defendants Richards and Oess have sued out a write of error and appealed to this court.

ASSIGNMENT OF ERRORS

I.

The Honorable District Court erred in denying defendants' motion to strike out the evidence of the witness Joe Lucas in regard to a conversation between witness and Richards as to Richards pleading guilty to the charge.

II.

The Honorable District Court erred in refusing to sustain the objection to the following question put to the witness Joe Lucas:

Q. "Did you explain to Oess, Richards and Toles, that when you shipped the whiskey up in the pipes of the pipe organ you were going to put the name of the consignee and the contents on the pipe?"

for the reason that said question was leading and suggestive.

III.

The Honorable District Court erred in overruling the objection of the defendants with the following question propounded to the witness, Jack Platt:

Q. "Had you done anything preparatory

to your trip to San Francisco?"
as the same is incompetent.

IV.

The Honorable District Court erred in refusing to strike the answer made by the witness to said question, as the same was not responsive.

V.

The Honorable District Court erred in overruling defendants' objections to the following questions:

Q. "Did you make any preparation in Centralia for the trip?" Ans.: "Yes."

Q. "What did you do?"
as the same was incompetent, irrelevant and immaterial.

VI.

The Honorable District Court erred in overruling the objection of defendants to the following question propounded to the witness, Jack Platt:

Q. "What did you fill those little bottles with?"
for the reason that the same was incompetent and hearsay, as far as defendants are concerned.

VII.

The Honorable District Court erred in admitting in evidence, over the objections of these defendants, Exhibits 5 and 6, for the reason that they were not identified.

VIII.

The Honorable District Court erred in refusing to strike out on motion of these defendants the testimony of the witness, J. H. Boomer, as to conversation between him and the defendants Oess and Richards, after the liquors in this case had been seized, and as to the conversation witness had with Joe Lucas, not in the presence of these defendants.

IX.

The Honorable District Court erred in refusing to sustain the objection of the defendant to the following question propounded to witness J. H. Boomer:

Q. "Did Lucas at that time say anything about what he was going to do in connection with the possible criminal prosecution?"

as immaterial, hearsay, incsompetent and irrelevants.

X.

The Honorable District Court erred in refusing to strike out the evidence of the witness F. W. McIntosh as to the conversation he had with the defendant Oess, as follows:

"I told Oess that if he cared to make a frank statement of the facts, we would be glad to have him do so, and he said wes not ready to talk. He wanted to consult an attorney before he decided as to just whether he would make any statement or not, and that was the extent of the conversation."

as incompetent, irrelevant and immaterial.

XI.

him do so and he said he was not ready to talk. He

The Honorable District Court erred in overevidence of the witness McCormick, conversation taken place between him and Lucas not in the presence of these defendants.

XII.

Th Honorable District Court erred in denying the motion of the defendant Oess for a non-suit as to him after the Government had rested:

First, because of the insufficiency of the

evidence upon which to base any verdict against him; and

Second, because there is a fatal variance between the evidence and the indictment.

XIII.

The Honorable District Court erred in denying a like motion for the defendant Richards.

XIV.

The Honorabl eDistrict Court erred in overruling the objection of these defendants to the following question propounded to witness T. H. McCleary, on his cross-examination:

Q. "Did you ever hear anything in connection with Oess or Richards with respect to the handling of intoxicating liquor?"

as incompetent, irrelevant and immaterial.

XV.

The Honorable District Court erred in overruling the objection of these defendants to the following question asked the defendant Oess, on his cross-examination:

Q. "Now, I want you to explain to this jury why it is, or if you can't explain, why Joe Lucas should concoct the story that he has on you and Bruce Richards?"

as not a fair question.

XVI.

The Honorable District Court erred in refusing to strike out of the cross-examination of the defendant, Oess, in which he said Joe Lucas did not have much chance to protect himself; that he had gotten his already; for the reason that the record of this Court shows that the indictment against Joe Lucas had been dismissed.

XVII.

The Honorable District Court erred in refusing to sustain the objection of these defendants to questions propounded the defendant Oess as to why Joe Lucas and Mrs. Joe Lucas had testified against him in this case, as incompetent, irrelevant and immaterial.

XVIII.

The Honorable District Court erred in allowing the defendant H. K. O'Neill to testify in rebuttal as to the price of 3-Star Hennessey Brandy and as to the price of bonded one hundred proof whiskey, as immaterial, irrelevant and improper rebuttal.

XIX.

The Honorable District Court erred in refusing to sustain the objection to the following question asked the defendant McIntosh by the government in rebuttal:

Q. "Did the defendant Richards, at any time, say to you, or in your presence, that he had ordered or bought, from Joe Lucas, brandy?"

for the reason that the same is improper rebuttal, and that the defendant Richards never said he made the statement to Mr. McIntosh.

XX.

The Honorable District Court erred in refusing to sustain the objection to the following question asked the witness John Berry, by the Government in rebuttal:

Q. "Did Bruce Richards, at any conversation had with you in February or March of this year, say that he had bought brandy from Joe Lucas?"

as improper rebuttal, incompetent, irrelevant and immaterial.

XXI.

The Honorable District Court erred in re-

fusing to sustain the objection to the following question asked the witness John Berry, by the Government on rebuttal:

Q. "Did Richards at any time tell you about Joe Lucas having agreed to deliver him brandy?" as improper rebuttal, incompetent, irrelevant and immaterial.

XXII.

The Honorable District Court erred in refusing to sustain the objection of these defendants to the following question asked the witness Berry by the Government in rebuttal:

Q. "Did Richards, when he came to you exhibiting the newspaper, seek to enlist your services in getting back the $240.00 from Lucas?" as improper rebuttal and as having gone through with in witness' examination in chief.

XXIII.

The Honorable District Court erred in refusing to sustain the objection of these defendants to the testimony offered by the Government's witness, Mr. McCormick, on rebuttal, as to what Richards told witness, if anything, about buying brandy from Joe Lucas, or about Lucas making delivery of intoxicating liquors on the same day or the next day after payment thereof to him at his place of residence, as improper re-

buttal.

XXIV.

The Honorable District Court erred in denying the motion of the attorney for the defendant Oess to instruct the jury to find said defendant not guilty, for the following reasons:

First, because the evidence is insufficient upon which to base a verdict of guilty against said defendant; and

Second, because there is material and fatal variance between the indictment and the proof.

XXV.

The Honorable District Court erred in denying the same motion for the same reasons on behalf of the defendant Bruce Richards.

XXVI.

The Honorable District Court erred in denying these defendants' motions for new trial, and erred in holding that there was no variance between the allegations of the indictment and the proof.

For Assignments of Error, see P. 88 to 95, Trans.

ARGUMENT

Assignments of Error Nos. 12, 13, 14, 25, and 26

FIRST

Directing our argument to assignments of error Nos. 12, 13, 24, 25 and 26, we have this to say: There was and is a fatal variance between the indictment and the proof. The indictment charges a conspiracy between the plaintiffs in error to ship whiskey from the State of California into the State of Washington, without so labeling the whiskey, and without showing the name of the consignee, and without specifying the quantity thereof.

The evidence upon which the defendants was convicted, all centered around the defendant Joe Lucas, against whom the Government dismissed the indictment. Lucas was the principal character in the tragedy. He was the one, who was to go to California and purchase and ship the whiskey into the State of Washington.

His evidence was necessary to a conviction, because he is the person to whom the money was paid and the only person who talked with any of the other defendants, and was the only person known to any of the other defendants. In fact,

Lucas went to each defendant personally and alone, and no defendant knew anyone else in the matter, excepting defendant Joe Lucas. This is Lucas' testimony and is the theory of the Government. Lucas did not inform any of the defendants as the manner in which he was to bring or transport the liquor into the State of Washington.

See his testimony P. 34-35 Trans.

In fact, when he went to California he did not know in what manner he would ship or bring the liquor into this state.

He testified as follows: "I said nothing about labeling it, or anything; I said nothing about as to whom it would be consigned; in fact(when I went down there, I do not know how I would do it."

P. 35 Trans.

The evidence does not disclose nor show that the plaintiffs in error ever entered into a conspiracy to have Lucas ship liquor or anything else into the State of Washington to a ficticious consignee, nor by a false label. The evidence, if it proves any crime at all, or any conspiracy whatever, which we deny, only proves that a conspiracy was entered into, to violate the Reed Act,

viz: to transport liquor into the State of Washington. Neither the indictment nor any of the allegations thereof is sufficient upon which to base any conspiracy under the Reed Act. . In other words, the indictment does not allege any conspiracy to violate the Reed Act, and does not allege that the State of Washington was dry territory at the time of the alleged conspiracy, nor at any other time. The indictment does not charge nor allege that it was or is contrary to the laws of the State of Washington to transport intoxicating liquors into the State of Washington. Therefore, the Reed Act is not shown to have been violated. We submit:

(a) That the evidence is not sufficient upon which to base a verdict of guilty against either of the plaintiffs in error.

(b) That there is a material and fatal variance between the evidence and proofs and the indictment filed in this action, and upon which the two defendants were, and each of them, was tried and convicted. The plaintiffs in error were charged with one specific offense and tried for and convicted of another crime. Therefore, assignments of error Nos. 12, 13, 24, 25 and 26 are and each is well taken.

Rabens vs United States, 146 Fed. Rep. 978, 77, C. C. A., 224.

Com. vs Harley, 48 Mass., 506.

Com. vs Kellogg, 61 Mass., 473.

Lowell vs People, 82 N. E. Rep., 226 (Ill)

In Rabers vs U. S. supra, the Court said:

"The count upon which plaintiff in error was indicted is clear and specific and leaves no doubt as to the offense charged, to-wit: A conspiracy to rob the post office at Latta. There is no allegation in the count which can in any way be construed to mean a general conspiracy to rob. The district attorney could undoubtedly have charged a general conspiracy. However, he did not see fit to do so, but elected to rely upon the specific charge of a conspiracy to rob the post office at Latta. Therefore, evidence tending to show a general conspiracy was incompetent and should have been rejected by the Court. The Government having relied upon a count charging a conspiracy which is restricted to one transaction, it was incumbent that it should satisfy the jury beyond a reasonable doubt that the plaintiff in error entered into a conspiracy with intent to rob the post office at Latta, as alleged. The case of Com. vs Harley, 7 Metc. (Msas.) 506, is on all fours with the case at bar * * .. * * * A careful inspection of the record leads to the conclusion that the introduction of evidence by the Government tending to show a general conspiracy, without

shewing that the defendant had knowledge that the post office at Latta was contemplated by the conspirators was prejudicial to plaintiff in error and no doubt resulted in his conviction."

What the Circuit Court of Appeals said in that case is very applicable to this case, in this:

There is evidence tending to show that the self-confessed conspirator, Joe Lucas, talked with plaintiffs in error before he went to California, and that he, Lucas, intended to ship intoxicating liquors into the State of Washington, but as he testified, he did not know in what manner he would transport the same, when he went to San Francisco.

P. 35, Trans.

He might have brought in by truck or automobile, or other method himself, without billing it to a ficticious consignee, and without shipping it to any consignee. Therefore, when, where and how did the plaintiffs in error, enter into a conspiracy with Lucas to ship liquor to a ficticious consignee, in the State of Washington, when Lucas testified that when he left the State of Washington for San Francisco, he did not know how he would get the liquor into the State of Washington. Yet the plaintiffs in error were convicted of having entered into a conspiracy to

ship intoxicating liquor to a ficticious consignee, and without disclosing the kind or character of the shipment, when the evidence only tends to show that plaintiffs in error were to receive intoxicating liquor from Joe Lucas in the State of Washington.

Surely there is a fatal variance between the indictment and proof in this case. There are no common law offenses against the United States, U. S. vs Hudson, 1 Cranch 32; United States vs Coolidge, 1 Wheat. 415. Besides, it is an elementary proposition of law that an indictment must be proved as laid, and that the indictment may not allege one offense, and the proof establish another. The drag net system does not have any standing in a Federal Court. In all sincerity, we submit that the evidence is not sufficient to convict plaintiffs in error of the crime alleged against them by the indictment.

To illustrate, a charge of conspiracy to prosecute G. who was not guilty of the crime, the state may not prove that defendants conspired to or did prosecute other parties, who were guilty and with whom G. had no connection. Such proof could only create prejudice. The prosecution of guilty persons is not proof of a conspiracy to prosecute the innocent.

State vs Walker, 32 Main 195.

SECOND

Considering assignments of error 8 and 9, we contend that each is well taken, and because the Court did not sustain the contentions and objections of defendants the Court committed error highly prejudicial to plaintiffs in error.

If there was any conspiracy as alleged in the indictment, the same had come to an end, and a successful end, on March 1st, 1919; for on that date the intoxicating liquor reached Seattle, Washington, on the Steamer "Admiral Schley," and was unloaded from said steamer on March 1st, 1919.

See testimony of George W. Berg, a Federal Officer and an employee of the Department of Justice, page 42 of Trans., wherein he testified:

"Mr. Orr arrived here and he and I on the morning of March 1st met the Steamer "Schley" at Pier D, Seattle, and when the shipment was unloaded, we seized it, and opened one of the cases and there found it to contain these dry cell batteries and whiskey in these bottles. There were eight cases. They were billed to Johnson, S. & E. Co., Seattle, which is a ficticious address."

Page 42 of Trans. See also testimony of Jack Platt, page 38 of Trans., where he testified:

"I left San Francisco on the 'Admiral Schley' the same boat I shipped the liquor on, about Feb. 27 or 28. The boat reached Seattle March 1st. I was arrested the first of March in Seattle. I went to San Francisco at Mr. Lucas' suggestion. He had told me that he intended to ship up some whiskey. At the time I was arrested, the liquors were seized by the Government." Page 38 of Trans.

The law is:

The act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. But only these acts and declarations are admissable under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator by way of narrative of past facts, are not admissable in evidence against the others.

Logan vs United States, 144 U. S. 263, 36 L. ed. 429.

Brown vs United States, 150 U. S. 93, 98, 37 L. ed. 1010.

Sparf vs United States, 156 U. S., 56, 39 L. ed. 345.

In Logan vs U. S., supra, the Court said:

"The Court went too far in admitting testimony on the general question of conspiracy.

"Doubtless in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. United States vs Gooding, 25 U. S. 12 Wheat. 460, 469, (6: 693, 696). But only those acts and declarations are admissable under this rule, which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or by failure, the admissions of one consporator, by way of narrative of past facts, are not admissable in evidence against the others. 1 Greenl. Ev. Par. 111; 3 Greenl. Ev. Par, 94; State vs Dean, 35 N. C. 63; Patton vs State, 6 Ohio St. 467; State vs Thibeau, 30 Vt. 100; State vs Larkin, 49 N. H. 39; Heine vs Com. 91 Pa. 145; Davis vs State 9 Tex. App. 363.

'Tested by this rule, it is quite clear that the defendants on trial could not be affected by the admissions made by others of the alleged conspirators after the conspiracy had ended by the attack on the prisoners, the killing of two of them, and the dispersion of the mob. There is no evidence in the record tending to show that the conspiracy continued after that time. Even if,

as suggested by the counsel for the United States the conspiracy included an attempt to manufacture evidence to shield Logan, Johnson's subsequent declarations that Logan acted with the mob at the fight at Dry Creek were not in execution or furtherance of the conspiracy, but were mere narratives of a past fact. And the statement to the same effect, made by Charles Marlow to his companions while returning to the Denson Farm after the fight was over, were incompetent in any view of the case."

"Tested by the rule laid down in these cases, the acts and declarations of Mrs. Hitchcock, on the morning after the killing, were not competent evidence against the plaintiff in error, of the existence of any conspiracy on his part, to kill her husband, or to resist the arrest of Hampton, or to commit any other unlawful act, such as the Court instructed the jury would render him responsible for the acts done by his associates while engaged in a criminal enterprise. If a conspiracy was sought to be established effecting the plaintiff in error, it would have to be by testimony introduced in the regular way, so as to give the accused the opportunity to cross-examine the witness or witnesses. It could not be established by acts or statements of others directly admitting such a conspiracy, or by any statement of theirs from which it might be inferred."

In Brown vs U. S., supra, the Court said:

"The Court improperly admitted the testimony, as to what Mrs .Hitchcock said after the killing, as evidence tending to establish a conspiracy between the plaintiff in error and herself and others to kill her husband. It was furthermore objectionable because there was no evidence in the case tending to show that the defendant, or his alleged co-conspirators killed either of the deceased under the mistaken supposition that either one of them was Hitchcock. In the admission of the statements and declarations of Mrs. Hitchcock the Court assumed that the acts and declarations of one co-conspirator, after the completion or abandonment of a criminal enterprise, constituted proof against the defendant of the existence of the conspiracy. This is not a sound proposition of law.

"In Logan vs United States, 144 U. S. 263, 309 (36: 429, 445), Mr. Justice Grey speaking for the Court said: 'The Court went too far in admitting testimony on the general question of conspiracy. Doubtless in all cases of conspiracy, the act of one conspirator in the prosecution of the enterprise is considered the act of all, and is evidence against all. United States vs Gooding, 25 U. S. 12 Wheat. 469 (6: 696). But only those

acts and declarations are admissable under this rule which are done and made while the conspiracy is pending, and in furtherance of its object. After the conspiracy has come to an end, whether by success or failure, the admissions of one conspirator by way of narrative of past facts, are not admissable in evidence against the other. 1 Greenl. Ev. Par 111; 3 Greenl. Ev. Par. 94; State vs Dean, 35 N. C. 63; Patton vs State, 6 Ohio, St. 467; State vs Thibeau, 30 Vt. 100; State vs Larkin, 49 N. H. 39, 6 Aam. Rep, 456; Heine vs Com. 91 Pa. 145; Davis vs State, 9 Tex. App. 363. The same proposition is stated in the following authorities: People vs Davis, 56 N. Y. 103; New York Guaranty & Indemnity Co. vs. Gleason 78 N. Y. 504; People vs McQuade, 1 L. R. A. 273, 110 N. Y. 307; also Wharton, Crim. Ev. (9th ed.) Par. 699.

We will now apply the facts to the law to determine whether or not the assignments of error Nos. 8 and 9 are well taken.

J. W .McCormick was a special agent of the United States, and when on the witness stand, testifying in behalf of the United States, the follow proceedings occurred:

He testified: Interrogated by Mr. Conway, attorney for the Government. "First I learned of the shipment through Sheriff Berry, March

7th, in the marshall's office in Tacoma. I went to Centralia and was introduced to a man named Lucas, that is deefndant Lucas.

Ques. Joe Lucas?

A. Exactly. Lucas and I talked about this matter then and he asked me if there was not some way that the thing could be fixed and that he was in deeply and that he thought that he had suffered enough, and I told him that there was only one way in which the matter could be fixed and that was for him to make a clean breast of the whole thing and have everybody else connected with it to do the same thing, and I told him—

Mr. Welsh, attorney for plaintiff in error:

We object to what he told Lucas.

The Court: Overruled.

Mr. Welsh: The different statements he got after going to Lucas would not bind these other defendants, they not being present, and it was after the consummation of the scheme, if there was any such scheme.

The Court: Overruled.

Mr. Welsh: The different statements he got after going to Lucas, would not bind these other defendants, they not being present, and it was after the consummation of the scheme.

The Court: You will consider what took place as affecting Lucas, but this charge being that of conspiracy, it is possible for the jury to find one of the defendants now on trial as being guilty of a conspiracy with Lucas; that being true, anything that Lucas said, even after the conspiracy, after the seizure, which I do not understand this to be—this is after the conspiracy?

Mr. Welsh: Yes.

The Court: Even after the seizure, what Lucas said became material by reason of that fact.

Mr. Welsh: As I understand the rule, I think your honor has stated the rule, in instructing the jury heretofore; after the end of the conspiracy, if there was a conspiracy, whether it was a success or not, anything said or done by any of the co-conspirators, if there was a conspiracy, is not admissable as against any of the other defendants.

The Court: That is true, but take a case like this: Say Lucas and John Smith were charged with having been in a conspiracy, and you had John Smith in one room and Lucas in another, and Lucas confessed to the conspiracy, after the transaction is over, Lucas confessed in one room, and Smith in another, you might say that what Smith said did not affect Lucas and

what Lucas said did not affect Smith, but the two taken togther would come under another rule.

Mr. Welsh: We object to the question as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Welsh: Exception. We may have an objection and exception to this line of testimony, as to anything that Lucas said.

The Court: The objection is overruled and exception allowed, and the jury will understand as I have stated to them in the other instance, where the statement was made after the seizure, you will consider it only as affecting Lucas, but it does take two men to make a conspiracy. If one man confessed he has been in a conspiracy you can consider that against him, at least. (P. 51-54 of Trans.)

J. H. Boomer, a defendant, but against whom the Government dismissed the indictment, page ..... of Trans., was a witness for the United States, testified as follows: (By Mr. Conway)

"In the latter part of January or the early part of February, I asked Lucas if he went to Frisco if he would ship me in some whiskey. He said he would and I gave him a check for $50.00. I heard it talked among myself, Oess and Rich-

ards that he was going to ship a pipe organ back."

Ques.: When was it?
Ans. After the stuff had been seized.
Ques. After it had been seized?
Ans. Yes, sir.
Mr. Welsh: We move to strike that out.
The Court: Motion will be denied.
Mr. Welsh: Exception.

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It will be remembered that the indictment against Lucas and Boomer had been dismissed before the commencement of the trial. The record on this point is as follows:

"It is stipulated between the Government and the defendants that on May 12, 1919, on motion of F. R. Conway, Assistant United States District Attorney, in open court, a dismissal of this case was made as to J. H. Bomer and Joe Lucas."

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We earnestly insist that the ruling of the trial Court was manifest and prejudicial error. As we construe the doctrine enunciated by the Supreme Court of the United States in the three cases above cited, it appears to us that the evidence of witness Boomer and of witness McCor-

mick as to declarations made to them by Lucas, long after the intoxicating liquor was shipped into the State of Washington and seized by the Government, was inadmissable. Its admission was directly contrary to the holding of the United States Supreme Court. The trial Court deemed these declarations admissable after the consummation of the alleged conspiracy, because Lucas was a self-confessed conspirator. But his confession is not admissable against the other defendants, when made in their absence, and after the conspiracy, if any, had been consumated. The United States Supreme Court in Sparf vs U. S., supra, said: "But the confession and declaration of Hanson to Sodergren after the killing of Fitzgerald were incompetent as evidence against Sparf. St. Clair, Hanson were charged jointly with the murder of Fitzgerald. What Hanson said after the deed had been fully consummated and not on the occasion of the killing and in the presence only of the witness, was clearly incompetent against his co-defendant Sparf, however strongly it tended to connect the latter with the commission of the crime. If the evidence made a case of conspiracy to kill and murder the rule is settled that after the conspiracy has come to an end whether by success or by failure, the admission of one conspirator by way of narrative of past facts are not admissable

against the others."

If statements made by Lucas after the end of the alleged conspiracy, are admissable, then he, could manufacture evidence mountains high against plaintiffs in error, by confessing his own guilt to an innumerable number of persons and connecting the plaintiffs in error with his unlawful scheme. If witness McCormick may testify that Lucas admitted his guilt to him, then all that Lucas need do is to hire a hall, and proclaim his guilt from the platform, and call in the audience to testify at the trial of plaintiffs in error, as to what Lucas announced.

In People vs Oldham (Calif.) 44 Pac. 312, the Supreme Court of California said: "Evidence of the statements of a co-conspirator, made during the life of the conspiracy, are admissable against the other conspirator; but after the crime has been committed, the conspiracy is an accomplished fact. It is a thing of the past, and such statements of a co-conspirator stand in no different relation to the law, and are no more admissable against a defendant, than though he were a stranger to the whole transaction, for they are the purest hearsay. This Court said, in People vs Moore, 45 Cal., 19: 'It was never competent to use as evidence against one on trial for an alleged crime the statements of an accomplice not

given as testimony in the case, nor made in the presence of defendant, nor during the pendency of the criminal enterprise and in furtherance of its objects. To hold such testimony admissable would be to ignore the rules of evidence settled and everywhere recognized from the earliest times.' The same doctrine is also reiterated in People vs Dilwood, 94 Cal., 89, 29 Pac. 420. It seems hat the trial Court admitted some of this objectionable evidence upon the ground that the statements were proper as proving the commission of the robbery by Hilton, but that cannot be so. As against the defendant, the actual commission of the robbery by Hilton could not be proven by his extrajudicial confessions; certainly not, in a case like this, where they were made without his presence and hearing. If Hilton had refused to take the stand and testify, it would not be contended for a moment that his confessions could have been used against this defendant for the purpose of proving the robbery, or for any other purpose.

"It is insisted that the foregoing error of the Court was cured when the witness Hilton took the stand, and gave to the jury substantially the same statements and confessions he had prior to that time made to the officers. We cannot say that the jury attached no importance to these

statements of Hilton, made shortly after the commission of the crime, nor that the verdict would have been the same if they had been rejected by the Court."

We also submit, that since the Government dismissed the indictment against Lucas and Boomer, that this was an acquittal of each of them. And if the principal was never engaged in a conspiracy, then plaintiffs in error could not be co-conspirators with either Lucas or Boomer. And acts or declarations of either Lucas or Boomer could not bind nor militate against plaintiffs in error.

Paul vs State 12 Tex. App. 346.

SECOND

Assignments of Error Nos. 3, 4, 5 and 6

With reference to Assignments of Error Nos. 3 and 4, we say: That when Jack Platt, a witness on behalf of the Government, who was upon the witness stand the following occurred. He said he made a trip with Joe Lucas from Centralia, Washington, to San Francisco, California, the part of February, 1919.

By Mr. Conway, Asst. U. S. District Attorney:

Q. Had you done anything preparatory to your trip to San Francisco?

Mr. Welsh: Objected to as incompetent.

The Court: Overruled.

Mr. Welsh: Exception.

A. When I was down there I prepared some dry cell batteries.

Mr. Welsh: I ask that the answer be stricken as not responsive.

The Court: Motion denied.

Mr. Welsh: Exception.

Q. Did you make any preparations in Centralia for the trip?

A. Yes.

Q. What did you do?

Mr. Welsh: We object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Welsh: Exception.

A. Made some tops for the cans of the dry cell batteries.

Q. What did you fill those bottles with?

Mr. Welsh: We object to that as incompet-

ent, hearsay as far as these defendants are concerned.

The Court: Overruled.

Mr. Welsh: Exception.

A. Filled them with whiskey, there were 1000 of them. I put them in cans, like Exhibit **No. 1.**

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We submit that there was not sufficient proof nor any proof establishing a conspiracy between Lucas and the plaintiffs in error, to ship intoxicating liquor into the State of Washington to a fictictious consignee. Since the plaintiffs in error are not shown by the evidence to have been parties to such a conspiracy, then whatever Jack Platt did would not be evidence against them, and his acts and declarations are inadmissable.

Com. vs Waterman, 122 Mass. 43.
People vs Arnold, 46 Mich. 268.
Hamilton vs Smith, 39 Mich. 222.

There was no evidence showing nor tending to show a conspiracy and therefore, the acts of Jack Platt may not be used to establish the alleged or any conspiracy.

People vs Parker, 67 Mich., 222, 34 N. W., 720.

THIRD

Assignments of Error No. 7

We contend that the Honorable District Court erred in admitting in evidence, over the objections of plaintiffs in error, Exhibits 5 and 6, for the reason that they were not identified. In order that this Court observe that this objection should have been sustained we call your attention to the evidence:

Witness Jack Platt was the party who packed the whiskey and placed it upon the "Admiral Schley" at San Francisco.

His testimony is as follows:

Q. What did you fill those little bottles with?

Mr. Welsh: We object to that as incompetent, hearsay as far as the defendants are concerned.

The Court: Objection overruled.

Mr. Welsh: Exception.

A. Filled them bottles with whiskey. There was 1,000 o fthem. I put them in cans, like Ex-

hibit 1 and packed them in packing cases and nailed them up.

Exhibit 2 is the same packing case they were packed in; 125 in a box; Exhibit 2 is similar to the the whiskey that went into those bottles. The packing that was done in San Francisco. There were eight of these boxes so packed. I did not buy the whiskey that went into those bottles, it was brought up to the house where I was packing the cases and I filled the bottles and packed the cases myself. I first saw that big trunk in Centralia; Mr. Lucas had it; I saw it in San Francisco; I had it there; I got it from the railroad station; it was shipped by express to Mr. Johnson: I took it up to the house where I rented, on Webster street; I opened it and took out what I needed and filled up these cans. After I got through with it, I put in three cases of bonded goods, whiskey.

Exhibit 5 for identification is the bonded whiskey. It was Old Taylor and Sunnybrook in pint bottles.

(Testimony of Jack Platt:)

I recognized Exhibit 6 for identification as the same kind.

Mr. Conway: I offer in evidence Exhibits 5 and 6.

Mr. Welsh: Objected to, not identified.

The Court: Objection overruled. They will be admitted in evidence.

Thereupon, said bottles of whiskey were marked as Government Exhibits 5 and 6.

Mr .Welsh: Note an exception, please.

Trans, Page 37-38.

On cross-examination witness, Jack Platt testified as follows:

(By Mr. Welsh:)

At the time I was arrested, the liquors were seized by the Government. **I could not swear that the liquor introduced in evidence was the same liquor shipped. Of course, there are many bottles similar to that.** I am pretty sure that these dry cells were the same. I do not know of anybody else making any caps like that. I did not make the cans; I made the caps. Lots of batteries are just like these.

After the liquor was placed upon the Steamer Schley in a trunk and boxes at San Francisco Jack Platt never again saw the liquor.

Upon arrival of the Steamer Schley at Seattle, on March 1st ,1919, some intoxicating liquor was seized by Federal officers. Page 38

of Trans.

Geo. W. Berg, a Government witness, on that point testifi,ed as follows:

Direct examination (by Mr. Conway:)

My name is Georg eW. Berg. I have been an employee of the Department of Justice for nine years. I recognize Government's Exhibit 1. It is whiskey in these dry cell battery containers, shipped from San Francisco on the "Admiral Schley." I first saw it the first of March, this year. On the 28th day of February, I was advised through Agent Orr of San Francisco that the shipment was enroute, and would reach Seattle on the "Schley." Orr arrived here the day previous, and he and I, on the morning of March 1st, met the "Schley" at Pier D, Seattle, and when the shipment was unloaded, we seized it and opened one of the cases there; found it to contain these dry cell batteries and whiskey in these bottles. There were eight cases. The Goverment's Exhibit 2 is one of the cases. There were eight of these boxes just like Goverment's Exhibit 2. They were billed to Johnson S. & E. Company at Seattle, which is a fictitious address. There is no such place. These red cans were packed in the cases. This box is packed in the Government's Exhibit 1 were in those cans. Most

same way; 125 of these cells in each case. packed similar to that. Bottles of whiskey similar to with the exception of the exhibits that were used of the whiskey was destroyed that same evening, in Platt's trial and this here.

I first saw Government's Exhibit 7, this big trunk in the hold of the "Schley." When the trunk had been coming up, it was empty, with the exception of a package of (41) these labels. The trunk had been broken open in the hold. Immediately on the trunk coming up, we went down in the hold of the boat, and made an examination there and found practically all the whiskey that had been taken and hid in different places of the hold, probably fifty or sixty pint bottles. Goverment's Exhibit 5 is one of them.

Goverment's **Exhibit 6 shown witness,** and he testified that it is a pint of Sunybrook whiskey **that he first saw it in the hold of the ship at the time.**

Trans. Page 42-43.

Joe Lucas, who purchased the whiskey, in San Francisco testified as follows:

"I did not ship anything, the trunk and shipment went together. Platt did the packing and filled the dry-cells with liquor. I did not have a

thing to do with htat. I did not see this box shipped, and do not know whether it was shipped all together or not. I could not say that I did see this box packed, nor could I swear that it was the same box that was packed in San Francisco and shipped to Seattle, because I did not put my own mark on it to identify it. I do not know whether the dry cells were full or empty when they left San Francisco.

Mr. Welsh: We move to strike out all the evidence about that box.

The Court: It having gone in without objection, the motion will be denied.

I did not bring any whiskey with me. I had three cases shipped from San Francisco; that was in addition to the dry-cells shipment, but I could not positively swear that they were ever shipped. I do not know in my own knowledge that this box and its contents ever left San Francisco, or that these dry-cells were filled with whiskey. I did not fill any (32) dry cells down there myself, nor had anything to do with filling them. I saw some of the dry-cells filled, but could not swear that these are the dry-cells I saw filled."

Trans. Page33-34.

The foregoing is all the evidence with ref-

erence to Ehibits 5 and 6. Exhibit Number 5 was bonded whiskey. Exibit 6 was also whiskey.

The Court should have sustain the objection of the plaintiffs in error for the whiskey which was introduced in evidence was not identified as the whiskey that was shipped by Platt from San Francisco.

You will bear in mind that when the whiskey as shown by Exhibits 5 and 6, arrived in Seattle, as Berg testified, that there was no whiskey in the trunk but the whiskey they found and confiscated, Exhibits 5 and 6, was found in the holds of the ship.

We insist that there is no evidence even tending to show that the whiskey which was introduced in evidence, Exhibits 5 and 6, was the whiskey wihich was purchased by Lucas and shipped by Platt, on the Steamer "Schley".

When Platt shipped the whiskey, it was in boxes, what whiskey was introduced in evidence was found in the holds of the ship.

During these prohibition days it appears to us that the Court, even if it will not take judicial notice of the fact, will assume in passing upon, Assignment of Error Number 7, that there were other people who may have shipped this whiskey on the Steamer "Schley" and that perhaps other who were on the Steamer "Schley" had whiskey,

and for all that we may know and for all that anybody knows, the whiskey which was introduced in evidenced, as Exhibits 5 and 6 may have been whiskey belonging to parties other than the parties involved in the case at bar.

FOURTH

ASSIGNEMENT OF ERROR NO. 18.

The Honorable District Court erred in allowing the defendant, H. K. O'Neill, a witness on behalf of the Government to testify in rebuttal as to the price of 3 Star Hennessey and as to the price of bonded one-hundred proof whiskey, for the reason that the same was immaterial, irrelevant and improper in rebuttal or otherwise. The evidence of O'Neill is as follows:

DIRECT EXAMINATION

(By Mr. Conway)

Lived in Tacoma a great many years. Prior to the first day of January, 1916, I was connected with the liquor business.

Q. Can you now testify as to what the price was on 3 Star Henessey, by wholesale, per case, at that time?

Mr. Welsh: I object to that as immaterial, improper rebuttal, irreelevant, because no matter

what the price was, it was not for sale on the market, had no marked price.

The Court: He is asking about prior to Jan. uary, 1916. Objection overruled, but the jury will not only take into account the circumstances and what the market value was on this particular liquor at that time, but the various explanations given, that it was a conversation concerning 3 Star Hennessey. You may answer the question.

Mr. Welsh: Exception.

A. Eighteen dollars a case.

Q. What was the price of bonded one-hundred proof whiskey at that time?

Mr. Welsh: We object to that as immaterial.

The Court: Overruled.

Mr. Welsh: Exception.

A: Well, it was all different prices according to the grade of the liquor. Sunnybrook was $8.00 or $9.00 a case of 12 quarts. Old Taylor was about $9.00. Old Crow $11.50. Ordinary bonded whiskey was around these prices. 3Star Hennessey Brandy is imported.

P. 78-79 of Trans.

We submit that this evidence was entirely immaterial and especially in rebuttal and it militated most disastrously against the plaintiffs in

error.

FIFTH

ASSIGNMENTS OR ERROR NO. 15 & 16.

When plaintiff in error, August Oess was upon the witness stand the following proceeding occured on cross examination of the witness:

Mr. Conway, U. S. District Attorney for the Government cross examining the defendant,

Q: Now, I want you to explain to this jury why it is, or if you can explain why Joe Lucas should concoct the story that he has on you and Bruce Richards.

Mr. Welsh: We object to that as not a fair question.

The Court: Overruled.

Mr. Welsh: Exception.

A. Not any more than to protect himself, I guess, that is the only thing I can say, the only thing I can give any reason for; I never can give any reason for it in the world, because what I told you is true just the same.

Q: You think Joe is protecting himself?

A: I don't know, but that is the only answer that I could give; I do not know **why he wants** to

get out of from it that way. I guess he did not have much chance to protect himself.

Q:What?

A: He did not have much chance to protect himself: he has already got his, I guess.

Mr. Welsh: I move to strike out the answer, because the witness, the record of this court shows that the indictment against him, Lucas has been dismissed.

The Court: Motion denied.

Mr. Welsh: Exception.

I have known Boomer for a couple of years. As far as I know, have been friendly. Never had much to do with him. Know him, that is all.

Q: Can you explain why he is testifying as he did to day against you?

A: No, I don't.

Mr. Welsh: We object to that question.

The Court: Overruled.

Mr. Welsh: Exception.

Q: You cannot offer any explanation about that?

A: No, sir.

Q: Can you explain why Mrs. Lucas has testified as she has against you?

Mr. Welsh: We object to that for the same reason, incompetent, irrelevant and immaterial.

The Cour: Overruled.

Mr. Welsh: Exception.

A: No.

We submit that such interogation of the plaintiff in error was unfair and humiliating to him, and reflected against him before the jury.

It consisted of an argument between the District Attorney and plaintiff in error, on a question upon which the District Attorney was better advised than the plaintiff in error.

If the District Attorney had not dismissed the indictment against Lucas and Boomer and if he had prosecuted Platt, perhaps they would not have verbally assaulted defendant, Oess.

We submit that the action against plaintifs in error should be dismissed, the judgment reversed and defendants discharged; and in any event that plaintiffs in error should be granted a new trial.

Respectfully submitted,

BATES & PETERSON,
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